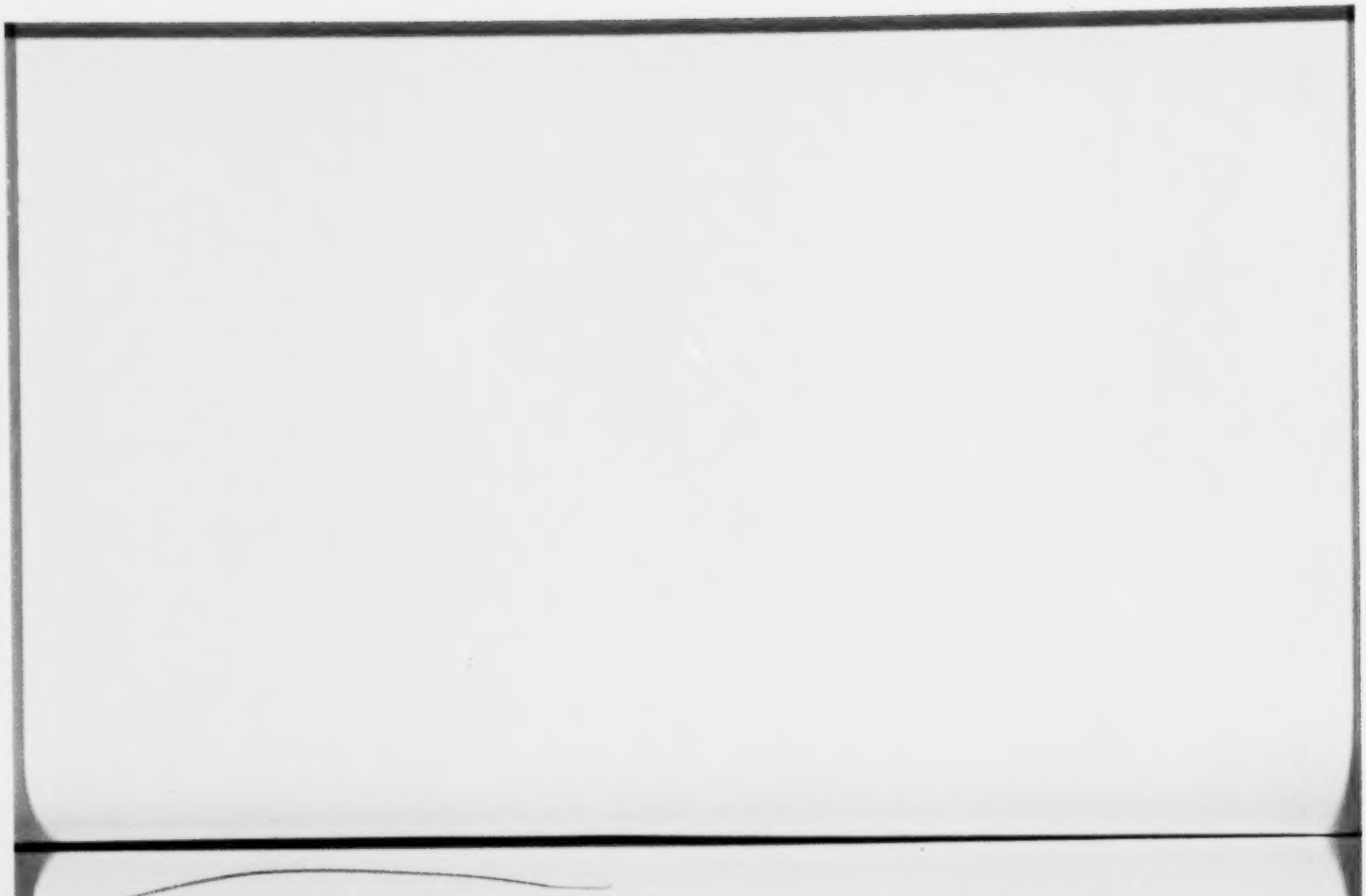

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

I. Opinions of the Court Below

There are two opinions of the Minnesota Supreme Court in each of the present cases. The first, filed May 25, 1945, affirmed the orders of the trial court denying the motions of petitioners made in the alternative for amended findings of fact and conclusions of law or a new trial. These opinions (not yet officially reported) may be found in 19 N. W. (2d) 7. The second opinion in each case was filed on October 22, 1945, and affirmed the judgment of the trial court entered pursuant to the first opinion of the Minnesota Supreme Court "for the reasons given in the previous opinion and upon authority of that opinion the judgment appealed from is affirmed." The second opinion in each case is not yet officially reported.

II. Jurisdiction

The final judgments in these cases were filed in the Supreme Court of Minnesota on October 25, 1945.

III. Specification of Errors Intended to Be Urged

1. Error in accepting the view of the trial court that the test of whether the petitioners were employed within the meaning of the *Fair Labor Standards Act* is whether the work which they did could be done in 12 hours a day instead of whether they were suffered or permitted to work for the period of time in dispute.

2. Error in relying on a union contract to show that petitioners were not required to work the full elapsed time and how many hours were in fact worked.

3. Error in denying claims on the ground that they have been waived because not timely presented.

4. Error in ignoring the decision of *Armour & Company* v. *Wantock et al* (1944), 323 U. S. 126.

5. Error in ignoring the decision of *Skidmore* v. *Swift & Company* (1944), 323 U. W. 134.

6. Error in disregarding the statement made by the trial court:

> "It seems to me the question resolves itself largely into whether or not men should be paid for time on the job during which it was not necessary for them to do any work . . ."

7. Error in refusing to take into consideration that the trial court was in fact a court of review.

IV. Argument

1. The trial court did not directly pass on the question whether in fact the petitioners were suffered and permitted to engage in actual work during the period in question. See *Fair Labor Standards Act*, Sec. 3(g).

Contrary to the view of the trial court and the Minnesota Supreme Court, the mere fact that the contract between the petitioners' collective bargaining representative and each respondent defined the hours "available" as 12 does not prevent compensation for the additional two hours where such 2 hours were in fact worked. See *Tennessee Coal, Iron & Railroad Company* v. *Muscoda Local No. 123, etc., et al.*, 321 U. S. 590.

That the parties have contracted to regard the monthly rate as the total amount to be paid regardless of the actual number of hours worked cannot control the operation of the Act unless it be held that employees may waive their rights under the Act. This, of course, they may not do. See *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local, supra.* Remedial statutes in the public interest, including wage-and-hour statutes, are not to be waived or avoided by private agreement. *United States* v. *Morley Construction Co.*, 98 F. (2d) 781, 789 (C.C.A. 2), certiorari denied *sub nom. Maryland Casualty Co.* v. *United States*, 305 U. S. 651; *Larsen* v. *Rice*, 100 Wash. 642 (1918); *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622, 626 (C.C.A. 7). The contracts involved in the present case are nothing more than attempts to write such a waiver in different verbiage. They continue unchanged a monthly wage, antedating the Act, which was therefore unconcerned with the

weekly hours worked, and made no provision for extra compensation for weekly overtime. There was added only the "technically elegant arrangement" (*Griffiths* v. *Commissioner*, 308 U. S. 355, 357) of the contract, by which the wages " 'are attributed to a different tree from that on which they grew.' *Lucas* v. *Earl*, 281 U. S. 111, 115" (*id.*, p. 358).

Moreover, the purpose of the "hours available" section of the contract was merely a bookkeeping device adopted after it became clear that the *Fair Labor Standards Act* was applicable to petitioners. It obviously was not intended to define working time. The contract nowhere contains or sets out a scheduled period of time off. The record nowhere supports the view that there was any regularly scheduled time off granted petitioners.

The case presents a clear instance of a situation in which overtime hours are arbitrarily defined for a purpose wholly unrelated to that claimed for it by respondents. See *Walling* v. *Helmerich & Payne; Walling* v. *Youngerman-Reynolds Hardwood Co.; Walling* v. *Harnishfeger Corp., supra.*

The findings of the trial court are based upon an erroneous view of the law, not merely with respect to the effect of the contract upon the employers' liability for overtime payments under the *Fair Labor Standards Act,* but also with respect to the assumption that unless there were a specific authorization or requirement for working the period in dispute no compensation is recoverable therefor under the statute. This is, of course, not the law. If the tasks assigned to petitioners were of such a duration that they could not be completed without working more than 12 hours then the petitioners are entitled to compensation for the hours so worked regardless of whether they were "required" to do so. See *Butler* v. *Carter, supra; Pinkley* v. *Allied Oil Corporation, supra.*

2. The trial court found in effect that petitioners had waived their claims for overtime in all situations in which they failed to bring "that fact to the attention of the defendant" (1 R. 315; 2 R. 369). Supporting this theory of waiver the court pointed out, as did the Minnesota Supreme Court, that the

terms of the contract were known to all of the petitioners. Wholly apart from the fact that the terms of the contract are irrelevant for reasons already given, is now well established that the mere failure to present a claim because, as here, there is a doubt as to the law, does not defeat liability. See *Overnight Transportation Co.* v. *Missel, supra.*

It may not be denied that both courts below refused liability upon the theory either that their labor organization had waived petitioners' rights or that petitioners themselves had waived such rights by a failure to make a timely claim. Such a theory is not in consonance with established precedents.

3. In the case of *Armour & Company* v. *Wantock et al.* (1944), 323 U. S. 126, which was decided on December 4, 1944, in connection with the interpretation of hours worked—waiting time—the Court held:

> "Time spent on employer's premises by employees of soap manufacturer doing interstate business as auxiliary firemen of private fire-fighting staff of such manufacturer, awaiting call in case of fire, constitutes working time within Act so as to entitle such employees to overtime compensation since such fire duty is an occupation necessary for the production of goods for commerce and therefore covered by Act, and periods of waiting, although spent by employees in relaxation because of nature of duty, are working time within meaning of Act."

It is submitted that there is a similarity between the instant facts and the facts in the *Armour* case. Therefore, since the Supreme Court of Minnesota did not distinguish the *Armour* case, it should have rendered its decision in accordance with the principles of law laid down by the United States Supreme Court in the *Armour* case.

In the case of *Skidmore* v. *Swift & Company* (1944), 323 U. S. 134, which was decided on December 4, 1944, in connection with the interpretation of hours worked—waiting time—the Court held:

> "Time spent at night by employees as auxiliary firemen of meat packing company in company fire hall subject to call in case of fire alarm in accordance with oral agree-

ment that they be available in case of fire and that, for each alarm answered, employees be paid an agreed amount constitutes working time within meaning of Act so as to entitle such employees to overtime compensation for waiting periods even though evidence shows they were rarely interrupted on account of alarms and spent most of such time in sleep or relaxation. No principle of law found either in statute or decisions precludes waiting time from also being working time."

As the trial court properly noted:

> *"It seems to me the question resolves itself largely into whether or not men should be paid for time on the job during which it was not necessary for them to do any work. . . ."*

When the Court uses the expression "on the job" it must mean exactly what it says—that the men were on the job.

In *United States* v. *Chicago, M. & P. S. Ry. Co.* (W. D. Wash.), 195 Fed. 783, the question presented was whether the Hours of Service Act limited time spent by engineers, firemen, conductors and brakemen before and after the actual movement of interstate trains. During the period preceding the trip the employees received compensation, for the succeeding periods they did not.

The court, finding the requirements of the statute unambiguous, held, at page 785:

> "An employee is on duty when he is at his post in obedience to rules or requirements of his superior, and ready and willing to work whether actually at work or waiting for orders or for the removal of hindrances from any cause. The words 'on duty' appear to have been intelligently chosen and used in the composition of the statute to bar all excuses for noncompliance with its requirements by any pretext of misunderstanding its meaning. *United States* v. *Illinois Central R. Co.* (D. C.), 180 Fed. 630."

Similarly, to require a fireman after 16 hours of duty at the end of a journey to watch the engine and keep the fire alive

in the boiler until the arrival of a relief crew is also a violation of the statute. *San Pedro L. & S. R. Co.* v. *U. S.* (C.C.A. 8th), 213 Fed. 326.

In another Hours of Service Act decision, *Missouri, K. & T. Ry. Co.* v. *U. S.*, 231 U. S. 112, 119, the Supreme Court, through Mr. Justice Holmes, held:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and if it be deducted they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were nonetheless on duty then inactive. Their duty was to stand and wait."

This principle has been followed and enforced without exception or challenge in a wide variety of situations. See, for example, *United States* v. *St. Louis Southwestern Ry. Co. of Texas* (W.D. Tex.), 189 Fed. 954, aff'd (C.C.A. 5th), 199 Fed. 990; *Minneapolis & St. L. R. Co.* v. *U. S.* (C.C.A. 8th) 245 Fed. 60, 64; cert. den. 245 U. S. 666; *Chicago, R. I. & P. Co.* v. *U. S.* (C.C.A. 8th), 253 Fed. 555; *United States* v. *Pitcairn* (E. D. Mo.), 23 F Supp. 242.

In *Fleming* v. *North Georgia Mfg. Co.* (N.D. Ga.), 33 F. Supp. 1005, 1006-7, the defendant manufacturing company made a claim not dissimilar to that of respondents here, that employees were not at work although they were admittedly on its premises engaged in various occupations connected with their actual manufacturing activities. Judge Underwood, in a contempt proceedings, held:

> "The pretense and artifice of defendants, both with respect to recovering back from their employees, under the guise of free will offerings, the amounts of restitution paid under the decree of the court, and also with respect to their claims that employees, though remaining in the factory long hours, were really not employed a great part of the time and were free to utilize part of the time as they saw fit, are peurile and too transparent to deceive any one. The benefits and purposes of the Fair Labor

> Standards Act cannot be set aside by any such devices and subterfuges."

The trial judge who rendered the instant decision in the District Court stated that he based his decision entirely upon the record without having the benefit of having heard the witnesses testify (2 R. 376). Honorable Bert Fesler, District Judge before whom this action was commenced and tried but who later became ill and was unable to dispose of this case, on June 2, 1943, during the trial of this action (and long before the decisions in the *Armour* and *Skidmore* cases cited herein which were filed on December 4, 1944) stated during the trial of the case (2 R. 363, 364):

> "The Court: I might clarify that a little more. I do not know in detail what men do in camps; but, if one of these cooks had nothing specifically to do at a particular time and he sat down in the dining room and played solitaire, or read a magazine, for an hour or two, he was 'on the job' if he quit playing cards or reading and went and did the thing that came up that ought to have been done by him. I don't know whether that interpretation is part of the federal law or not, but I would be disposed to be of that opinion."

Judge Fesler anticipated what was later judicially determined in the *Armour* and *Skidmore* cases cited above.

We do not think that a basis of distinguishing these cases is presented in the decisions of the Minnesota Supreme Court. It is wholly unrealistic to assume that an individual who may be free to snatch a few moments' rest without being subject to rebuke in a lumber camp at a great distance from the seat of normal activity is not on the job in any realistic sense. It is plain that the character of the tasks involved herein subjected petitioners to responsibility for continuous service during the hours in dispute.

If the decision below is left unreversed, thousands of employees engaged in occupations which require continuous service will be denied their rights under the law because they happen to be free from active duty at unscheduled and arbitrary periods. Where, as here, the pattern of service is such

as to require continuous presence of the individual in his place of work, the law requires that he be paid for that service.

Respectfully submitted,

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